

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 580 OF 2014

MUSA MUMERA KEYA.....PLAINTIFF/APPLICANT

VERSUS

ROISE BUSILI.....DEFENDANT/RESPONDENT

RULING

The application is dated 6th September 2019 and is brought under Order 12 Rule 7 of the Civil Procedure Rules and section 1A of the Civil Procedure Act seeking the following orders;

1. That the dismissed suit on 16/7/2019 be reinstated and be determined on merit.
2. That there be an order on costs.

It is based on the on grounds that, the cause of action revolves around determination of interests in land No. Tiriki/1372. That the Hon. Court had received the surveyor's report and what was left was final determination of the suit. The case came on 16th July /2019 when the applicant was indisposed by way of sickness. That counsel on record was not aware of the hearing date of 16th July 2019. That land matters are emotive and ought to be determined on merit. That the applicant is willing to abide by any conditions as may be put by the court.

The respondent submitted that, the applicant has already transferred land parcel No. Tiriki/Tigoi/1372 into the name of his son one JOHN MANDU SUDI annexed hereto and marked RBI and 2 is a copy of the land register and summons from the land registrar confirming the position. That the transfer of the suit land into the name of John Mandu Sudi by the applicant was an attempt to defeat justice. That in any event the reinstatement of this suit will not assist the applicant as the judgment in Vihiga Senior Principal Magistrates' Court vide civil case No. 145 of 2006 remains unchallenged as the applicant never appealed against that judgment annexed and marked RB2 is a copy of the said judgement. That pursuant to the secret transfer of this suit into the name of John Mandu Sudi by the applicant there have been several arrest of his son Nebert Onaya Adanga who has resulted into his trial vide Hamisi Criminal case No. 214 of 2018 Annexed and marked RB1 3 is a copy of the charge sheet. That on the said charge sheet it is indicated that land parcel No. Tiriki/Tigoi/1372 belongs to John Mandau Saudi annexed hereto is the statements of John Mandau. That it is therefore apparent that the applicant as of now has no known legal interest in land parcel No. Tarik/Tigon/1372.

This court has considered the application and the submissions therein. The applicant's counsel submitted that the applicant was indisposed on the material day and could not attend court. I have perused the court file and find that this suit was dismissed on 16th July 2019. It is was not until 6th September 2019 that the present application was filed. The applicant was in court when the hearing date was given in his presence and he was given the final adjournment. I find that there is inordinate delay in filing this application. This is an old matter of 2014. Reasons advanced for non attendance are unacceptable.

In the case of Utalii Transport Company Ltd & 3 Others vs NIC Bank & Another (2014) eKLR, the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In Ivita v Kyumbu (1984) KLR 441, Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant. I find this application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18TH DECEMBER 2019.

N.A. MATHEKA

JUDGE